United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

74-2391

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PRS

UNITED STATES OF AMERICA,

Appellee,

-against-

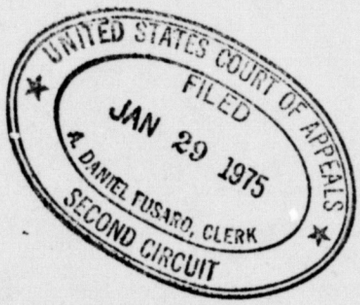
PETER A. PEPE and
JOHN E. COUGHLIN,

Appellants.

Docket No. 74-2391
Docket No. 74-2441

APPENDIX TO THE BRIEF
FOR APPELLANT JOHN E. COUGHLIN

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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D. C. Form No. 100
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JUDGE FRANKEL 74 CRIM. 104

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U. S.:*
vs.	James E. Nesland, AUSA
JOHN E. COUGHLIN, a/k/a Tinker	264-6470
PETER A. PEPE	
	For Defendant:

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED	DISBURSED	
Fine,			1/30/74	Treasurer	5 —		
Clerk, 1 & 2			1/31/74	"		5 —	
Marshal,							
Attorney,							
~~Commissioner's Court,~~ T.18							
~~Witnesses~~ 371, 2113(a), b)(d)							
Consp. to rob bank. (Ct. 1)							
Robbery of insured bank by							
use of force and violence. (Cts 2-4)							
(Four Counts)							

DATE	PROCEEDINGS
1-31-74	Filed indictment.
2-11-74	Deft. Coughlin (atty. present) Pleads not guilty.
	Deft. Pepe (atty. present) Pleads not guilty. $20,000. P.R.B. to be signed by wife. Case assigned to Judge Frankel. Lasker, J.
2-15-74	PETER A. PEPE - Filed P.R.B. in amt. of TWENTY THOUSAND DOLLARS
2-20-74	Filed Govt's notice of readiness for trial.
2-21-74	PETER A. PEPE-Filed notice of appearance by Daniel L. Meyers 380 Madison Ave. NYC

DATE	PROCEEDINGS
2-22-74	Filed CJA appointment of counsel Ralph A.Addonizio 185 Sullivan St. NYC
3-5-74	JOHN E.COUGHLIN - Filed affdvt. & notice of motion for discovery & inspection, To strike alias Tinker and to suppress....Ret. March 13,1974. Frank
3-14-74	Filed affdvt. of JAMES E. NESLAND, AUSA in response to the joint motions of deft's.
3-19-74	BOTH DEFT'S - Filed memorandum opinion #40474 defts have made motions largely identical to each other*****Except as granted***motions are denied. Frankel, J.....Mailed notice
3-19-74	P.A.PEPE - Filed notice of motion for discovery & inspection & to suppress
4-5-74	Pre-Trial Conference Held
4-29-74	Filed affdvt. of AUSA James E. Nesland in satisfaction of the outstanding discovery requ
6-3-74	Filed stip & order that deft's are aware of their rights to a speedy trial and waive the requirements of the six months rule....Frankel, J.
5-31-74	PETER PEPE - Filed CJA appointment of David Blackstone,Esq. 335 B'Way NYC...Frankel,J.
8-23-74	Filed affdvt.of James E.Neslan,AUSA in support of a W/H/C ad Test.
9-10-74	BOTH DEFTS - Jury trial begun before Frankel, J.
9-11-74	Trial cont'd.
9-12-74	Trial cont'd.
9-13-74	Trial cont'd.
9-16-74	Trial cont'd. & concluded. Both Deft's GUILTY on Cts. 1 thru 4 Sent. 10-16-7 Both Deft's Remanded....Frankel, J.
10-23-74	PETER A.PEPE - Filed Judgment(Atty.David Blackstone,present)the deft is committed for imprisonment for a period of FIVE YEARS on count 4,the Court having treated the four counts as stating a single offense for purposes of imposition of such sentence. The Court recommends commitment to Danbury,Conn.,in such institution as may be appropriate, if that is not possible, as close as feasible to New Haven,Conn...Frankel,J..Ent.10-25- Deft is remanded.....

(Cont'd.on page 3)

DATE	PROCEEDINGS
10-23-74	JOHN E.COUGHLIN - Filed Judgment(Atty.Roland Thau,present)the deft is committed for imprisonment for a period of FIVE YEARS on count four, the Court having treated the ~~four~~ four counts as stating a single offense for purposes of imposition of such sentence...The Court recommends commitment to Danbury,Conn., in such institution as may be appropriate, if that is not possible,as close as feasible to New Haven, Conn.....Frankel, J.....Ent.10-25-74----Deft is Remanded.
10-23-74	PETER A. PEPE - Filed notice of appeal from final Judgment of Oct.23-74..Copy given to U.S.Atty. and Mailed to deft at Federal House of Detention 427 West St. New York,N.Y.....Permission to appeal in forma pauperis granted....Frankel,J
10-30-74	JOHN E. COUGHLIN - Filed notice of appeal from judgment of 10-23-74..Copy given to U.S.Atty. and Mailed to deft at Federal House of Detention 427 West St. New York,N.Y. and Atty.Roland Thau 15 Park Row New York City 10038..

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA : 74CRIM 104

- v - : INDICTMENT

JOHN E. COUGHLIN, a/k/a Tinker, :
PETER A. PEPE, :

Defendants. :

The Grand Jury Charges:

1. From on or about the 1st day of September, 1972 up to and including the 30th day of October, 1972, in the Southern District of New York, and elsewhere, JOHN E. COUGHLIN, a/k/a Tinker, and PETER A. PEPE, the defendants, and Walter Joseph Burton, named herein as a co conspirator and not as a defendant, unlawfully, wilfully, and knowingly, did combine, conspire, confederate, and agree together and with each other and with others to the grand jury unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Sections 2113(a), (b), and (d).

2. It was a part of said conspiracy that JOHN E. COUGHLIN, a/k/a Tinker and PETER A. PEPE, the defendants, and Walter Joseph Burton, named herein as a co-conspirator and not as a defendant, unlawfully, wilfully, and knowingly, and by force and violence and by intimidation, would take from the person and presence of another, money belonging to and in the care, custody, control, management and possession of the Empire National Bank, Hyde Park Branch, Hyde Park, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

3. It was further a part of said conspiracy that JOHN E. COUGHLIN, a/k/a Tinker and PETER A. PEPE, the defendants, and Walter Joseph Burton, named herein as a co-conspirator and not as a defendant, unlawfully, wilfully, and knowingly, and with intent to steal and purloin, would take and carry away money belonging to and in the care, custody, control, management, and possession of the Empire National Bank, Hyde Park Branch, Hyde Park, New York, a bank the deposits of which were then insured

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knowingly, and by force and violence and by intimidation, did take from the person and presence of another, money, to wit, approximately $31,000.00 belonging to and in the care, custody, control, management, and possession of the Empire National Bank, Hyde Park Branch, Hyde Park, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2, 2113(a).)

COUNT THREE

The Grand Jury further charges:

On or about the 30th day of October, 1972, in the Southern District of New York, JOHN E. COUGHLIN, a/k/a Tinker and PETER A. PEPE, the defendants, unlawfully, wilfully, and knowingly, and with intent to steal and purloin, did take and carry away money, to wit, approximately $31,000.00 belonging to and in the care, custody, control, management, and possession of the Empire National Bank, Hyde Park Branch, Hyde

Park, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2, 2113(b).)

COUNT FOUR

The Grand Jury further charges:

On or about the 30th day of October, 1972, in the Southern District of New York JOHN E. COUGHLIN, a/k/a Tinker, and PETER A. PEPE, the defendants, in committing and attempting to commit the offenses alleged in Counts 2 and 3 of this indictment, all allegations of which are incorporated herein by reference, unlawfully, wilfully and knowingly did assault and put in jeopardy the lives of persons by the use of dangerous weapons and devices, to wit, pistols.

(Title 18, United States Code, Sections 2, 2113(d).)

FOREMAN

PAUL J. CURRAN
United States Attorney

[illegible]

Both dfts, altho first sentenced to 5 yrs on Count 4, the Court having treated the 4 counts as stating a single offense for purposes of imposition of such sentence. Remanded.

Frankfurter J.

RM

2/11/74 Deft Coughlin Cathy M. Nugent present) pleads not guilty. Case assigned to Judge Frankel

Deft Pepe Cathy Meyers present) pleads not guilty. Case assigned to Judge Frankel. $20,000 PRB to be signed by wife.

Parker, J.

A.D.

d

MAR 1 1974 PTC held. Trial set for June 3, 1974.

(E.D.)

September 10, 1974 Jury trial began as to both defendants before: Frankel, J.

SEP 11 1974 Trial continued.

SEP 12 1974 Trial continued.

SEP 13 1974 Trial continued.

SEP 16 1974 Trial continued & concluded. Jury verdict - Both defts guilty on counts 1 thru 4 - Jury polled. motions reserved until oct 16, 1974 - Sentence October 16, 1974 at 10: Am. Both defts Remanded

Frankel, J.

(SW)

UNITED STATES OF AMERICA

vs 74 Cr 104

JOHN E. COUGHLIN, a/k/a Tinker,
and PETER PEPE

September 16, 1974

10 a.m.

(In open Court, jury not present.)

MR. THAU: Your Honor, I believe we had neglected to make our motions at the end of the entire case, and even though summations have been heard, the Defendant John Coughlin, your Honor, would move under Rule 29 for a judgement of acquittal on the gorund that the Government has failed to prove its case on any of the counts beyond a reasonable doubt.

THE COURT: I take it there are similar motions for the Defendant Pepe?

MR. BLACKSTONE: Yes.

THE COURT: Those will be denied.

Let's have the jury in for the charge, please.

(Jury present.)

THE COURT: Good morning, ladies and gentlemen.

Last week you heard the evidence in this case. At the end of the week you heard argument, the opposed views as to what you should or should not find as the facts from that evidence.

As we have all told you repeatedly, all those things were addressed to you in your role as the sovereign judges of the facts. Assisting you in performing that function, it is my job to give you now the rules of law that govern in this case and that govern your deliberations.

Remember that nothing I say to you, nothing the lawyers have said to you, is evidence, and your task is to find the facts from the evidence.

The indictment, the accusations that begin this case, is not evidence that any of the things said in it are true. The indictment tells the Defendants what accusations they must meet, and it gives rise to the issues on which I am about to instruct you and on which you are, as we keep saying because it it true, the sovereign judges.

I will give you a couple of copies that have been xeroxed of that indictment simply for your convenience in the jury room to keep track of the issues that will be deliberated before you and the matters on which you will have to render a decision.

But, remember. that is its only function, to give you a sort of reminder of how the case started and what it is about. It is not evidence of any kind.

In response to that indictment, the two Defendants on trial here pled not guilty. That meant from the instant of that plea that the burden was placed on the Government to prove guilt beyond a reasonable doubt before either of these defendants could be convicted.

It is a corollary of that burden on the Government that a Defendant need not adduce any proof of any kind about the events that are in issue.

A Defendant comes before us in every case, and in this case, armed with the presumption of innocence. That presumption has been with these Defendants throughout this criminal proceeding. It remains with them now.

It will be enough to require you to acquit until or unless you are convinced of guilt beyond a reasonable doubt. Being under no obligation in our system to adduce evidence of any kind, though he may if he wishes, a Defendant, of course, has an absolute right to decide himself and in consultation with counsel whether or not he will take the witness stand.

As you know, the Defendants in this case have not taken the stand. To respect that right of theirs to make that decision, to respect it fully, you must draw no inference of any kind against either of

them for their failure to take the stand.

More broadly, let me say, and then abandon this subject, that the fact that the Defendants have not taken the stand should play no part at all in your deliberations.

We have talked a lot, all of us, about the requirement of pooof beyond a reasonable doubt, and in the course of arguments some parts of the definition of that concept, familiar to lawyers and Judges, has been mentioned to you.

But, it is important and necessary that I undertake for you to define what we mean when we speak of the burden of proof in a criminal case beyond a reasonable doubt.

We mean, to begin with, what the words literally undertake to convey. We mean a doubt that has its foundation in your reason, your reason applied to the evidence or lack of evidence in the case placed before you.

A reasonable doubt is one that has substance and, as we frequently say, is not merely shadowy or conjectural. It is a doubt that takes its origin in your judgement, your common sense, your collective experience, applied to the record of evidence in the

case before you.

It is not, as has been mentioned, an excuse to avoid performance of unpleasant duty. It is not a guise or a pretext for extending sympathy to any Defendant.

A reasonable doubt is the kind of doubt that would cause a prudent person to hesitate before taking action in some matter of importance to himself or herself. To say that in more words, if you in your own personal affairs, as all of you and all of us do, confront a decision of some consequence, and if you proceed rationally and objectively to review the facts and the factors that have a bearing on that decision, and if at the end of that kind of study you find yourself beset by uncertainty and unsure of your judgement, you have a reasonable doubt.

The converse of that is equally true:

If you had such a serious decision to make, and if you proceeded to the kind of detached and objective review that I have described of the things that have a rational bearing on that decision, and if at the end of that you didn't find yourself beset by uncertainty and unsure of your judgement, and the phrases I have used, then you would not have a reasonable doubt.

Proof beyond a reasonable doubt does not mean proof beyond any conceivable doubt or proof to an absolute certainty. If it meant that, then, strictly speaking, no Defendant could ever be convicted in any criminal trial, since a criminal trial, as I have told you, is conducted only when there are issues about matters of fact, and it is in the nature of issues of fact, and most clearly about matters of fact that lie in the past, that they can not be proved to an absolute or mathematical certainly.

So when we speak of proof beyond a reasonable doubt, we don't mean that kind of proof beyond any conceivable doubt whatsoever.

At the same time, to sum up these instructions on this important concept, the main thought is to impress on you that in a criminal case in our system, the burden of proof on the prosecution is a very high one, and that you may convict only if your minds are free of the kind of uncertainty and reservations I have undertaken to describe in these instructions.

Now let's turn from those gnneral principles, and postpone some others, to the specific accusations or charges against these Defendants in this case.

As you know, there are four counts in this

indictment; that means four charges of crimes, though, as you know, and as these instuuctions will remind you, they arise basically out of a single course of alleged events and alleged kinds of conduct by the Defendants in this case.

The first count charges that the two Defendants here conspired together with Walter Burton to commit what we may describe briefly, but adequately for the moment, as the armed robbery of the Empire National Bank in Hyde Park, New York at the end of October, 1972.

The remaining three counts, so called substantive counts, charge that the Defendants with Burton carried out that criminal plan in that they took money from people in that bank by force and intimidation, in that they carried away intending to steal the money so taken, and in that they accomplished these criminal objectives by using assaults or jeopardizing the lives of people in the bank by use of hand guns which they possessed, according to the indictment, as part of the means employed for the commission of that robbery.

It may develop as you proceed to exercise the sovereign judgement you have over these matters, that you will find in the end that the critical issues for your decision may be stated fairly briefly.

You may conclude in this case, in the last analysis, that your task is to determine whether you are convinced beyond a reasonable doubt that one or both of the Defendants before you, tobether with Walter Burton, planned and carried out that armed robbery of the Empire National Bank on October 30th, 1972.

That, as I say, may turn out to be the ultimate nature of your task and the of the issue before you, as you come finally to judge it and seek a verdict together. Nevertheless, it is under our law and in the interest of justice that you be given instructions in some detail as to the elements and the requirements of proof of each of the four counts in this indictment, and for the next little while the purpose of the things I say is to serve that requirement of the law and to give to you these elements and requirements of pooof so that youwill understand fully the things that are placed before you for decision.

Proceeding to do that, let me return to the first count, the charge of conspiracy; again, in short-hand, conspiracy to rob the Empire National Bank. Somewhat more specifically, the first count, and you will have the words of it before you, so I am not going to read them, charges that the Defendants and Walter Burton

agreed, conspired, combined together to take money from other people, money that was in the custody or care of employees of the Empire National Bank, a bank which according to the indictment, was insured by the Federal Deposit Insurance Corporation, and that it was part of this conspiracy or agreement that the conspirators would use force or intimidation to accomplish that robbery.

It is alledged that it was part of the conspiracy that, having taken the money from the bank's employees or their custody, the Defendants would carry it away with intent to steal it.

Then it is alleged that as part of the conspiracy, they agreed that they would assault or put in jeopardy the lives of people in the bank in the carrying out of that robbery.

Finally, in the text of the first count of the indictment, there are alleged three so called overt acts that are said to have been committed during this conspiracy and in its furtherance, and I will be telling you about them and their place in this indictment in a little while.

Let me say by way of background for this first count a few words about the nature of the concept

of conspiracy in our law. A conspiracy, as I think I have already indicated to you by the description, is an agreement or combination or arrangement among two or more people to commit some criminal or unlawful act. It is the conspiracy or agreement that is the essence of this crime, and so under our law, as under the law of many other places, you can have the completed crime of conspiracy, even though the unlawful object or purpose is never carried out or achieved.

Let me put that in terms of a simple illustration that I give you simply for illustration, one that has nothing to do with the facts of this particular case.

It is possible and familiar in our law that you could have a conspiracy to commit a murder. There would be an agreement among two or more people to kill someone, to put it in very simple terms. If the elements of conpsiracy, as I will define them for you in a little while are made out, the unlawful agreement, the membership and overt act, you could have the completed crime of conspiracy, even though the intended victim was never killed.

And with that formulation, we commonly distinguish between the crime of murder, which we call

the substantive crime, and the conspiracy, the agreement to commit that substantive wrong, and one, as I may, may exist without the other.

You may have a conspiracy without the completeon of the goal or purpose of the conspiracy, and, of course, the converse is equally true. You can have substantive crimes without conspiracies.

I think that's enough about the general theory of this. Let me turn specifically to the particular charge of conspiracy set out in Charge 1 of this indictment, and let me tell you at this point that before you could convict either Defendant on this first count, you would have to be satisfied beyone a reasonable doubt that there has been proof of each and every one of the three essential elements.

I say each and every one because I mean that. If any one of these three is not established beyond a reasonable doubt, you must return a verdict of not guilty

Those three essential elements are as follows:

First, that for some time between the first of September and the 30th of October, 1972, there existed a conspiracy of the kind alleged in this indictment, namely a conspiracy to take money from people in that bank, to steal it and carry it away, and to use assault

or the jeopardizing of lives in the accomplishment of that taking and stealing.

Second, that the Defendants here on trial, or one of them, willfully and knowingly participated in that conspiracy.

Third, that one conspirator, or at least one conspirator, committed at least one of the three overt acts I mentioned before set out in the indictment as being acts during and in furtherance of that conspiracy.

I want to say a word or more than a word about each of these three essential elements. Before proceeding to that, let me mention something just to remove it from your concerns. I mentioned to you that the reason why this case finds itself in the Federal Court is that the bank in question is alleged to have been insured by the Federal Deposit Insurance Corporation, and these kinds of wrongs committed with respect to banks so insured are, under Federal statutes, Federal crimes.

Although that is, therefore, a kind of jurisdictional basis for this case, and although I have mentioned it to you because it is here, I now instruct you that you must not pay any special attention to it or you need not pay any special attention to it.

You may remember that at some point in this trial it was stipulated, agreed, that the Empire National Bank was at the times in question insured by the F.D.I.C. There is no dispute about that. The disputed matters, as I think you fully know, lie elsewhere, so you need not concern yourselves with that.

Let me return now to the three essential elements of the conspiracy charge. I return to the first, which is the requirement of proof that the conspiracy alleged in Count 1 did in fact exist during the period alleged.

It is necesary at first, perhaps with some repetition, to dwell a little bit on the meaning of the concept of conspiracy. I have told you that the sense of this concept, the essence of the crime of conspiracy, is the combination or agreement or understanding that two or more people will do some criminal thing or things.

It is the unlawful agreement that is the heart of the matter in a conspiracy charge. Although we use the word agreement and frequently say that a conspiracy is a kind of partnership in crime, you will understand that we don't use the words agreement or partnership in their customary lawful sense.

An agreementor partnership in crime need not be, and commonly is not, formal or express or neatly

organized. When people undertake, if people undertake, to act together to commit crimes, such is done informally, mush is left to tacit, unexpressed, silent understanding.

Nevertheless, since it is agreement that is the crux of this matter, you will understand that in order to find this first essential element, you would have to be convinced that there was a clear and unequivocal understanding among these people to commit the crimes alleged to have been the objects of the conspiracy in Count 1 of the indictment.

I mention to you that if a conspiracy is shown to have existed, and if the other elements I will be elaborating briefly are made out, the crime can be established, even though the conspiratorial objectives were never reached.

At the same time, evidence that the objects were carried out may, of course, be taken as some evidence in a particular case that a conspiracy to achieve those objects actually existed.

The task of a jury in a conspiracy case, your task in this case, is to take all the evidence together, determine the things in that evidence that you find persuasive and convincing as demorstrating what were really the facts back on those days in 1972, to reconstruct

this whole picture from this evidence and determine in that way whether you are convinced beycnd a reasonable doubt that this conspiracy, as alleged in this indictment, actually existed.

If you are convinced of that, the precise duration or period of the existence of the conspiracy is not in itself a critical matter. The indictment says, and I repeat it in summarizing it, that this conspiracy existed from on or about September 1st to on or about October 30th, 1972, and you know from the remainder of the indictment and the evidence that has been placed before you that it is the Government's submission that October 30th is the critical and culminating date, as it were, of that alleged conspiracy.

All I am instructing you now on with respect to the matter of duration is that the Government does not need to prove that the conspiracy existed through all of that period alleged in the indictment.

If it has been established to your satisfaction that there was such a conspiracy, it would be sufficient in this respect if you find it existed for at least some period of days within the time from September 1st to October 30th, 1972.

So much for this first essential element. If

you are not satisfied that this first element has been established, then your task is ended with respect to Count 1, and you must acquit.

If, on the other hand, you are convinced that there was a conspiracy of the kind alleged, that is that the first element has been proved, then you proceed to the second, the question, as I have stated it, of alleged membership or partnership or participation by each or both of the Defendants in that conspiracy.

I have said things like, "each" or, "both" at several points in these instructions, and that's meant to concentrate your attention, as it must be concentrated, on the fact that you have before you two separate distinct individuals here on trial.

You must consider as you go through the concerns you will have in this case each of them as a separate distinct individual.

Guilt or innocence in our system is a personal matter. We don't have doctrines of guilt by association. And that is especially relevant in considering this question af alleged membership in a conspiracy.

That question must be considered by you with particular and specific and individual reference to each of the Defendants before you. The participation

of any Defendant in a conspiracy must be established, if it is established, by evidence as to his own words, his own actions and his own conduct.

Obviously, in understanding people's words and actions and conduct, you are frequently interested in the words, actions and conduct of other people in relation to whom that person may have acted or spoken or done one thing or another.

So here, as in any case, you may consider other facts, the actions of other people, the conduct of other people; in understanding what you conclude each of these particular Defendants did or did not do at the times in question. You may consider the conduct and statements of each of them in relationship with what you find to be relevant and meaningful conduct and statements of other people.

But in the end you are to decide with respect to each of these Defendants, Mr. Coughlin and Mr. Pepe, was he or was he not a member of, a participant in, this alleged conspiriacy. To find that anybody was a member of a conspiracy, you must find that he knew the unlawful purpose or purposes and that he knowingly and intentionally acsociated himself with them.

The Government is required to establish beyond

a reasonable doubt before it may prove membership that the Defendant whom you are considering knew the purpose, the purpose to rob that bank, and made that purpose his own, intended to join in accomplishing it, having his own stake and interest in the success of this criminal venture.

You will understand on the other side that mere association with one or more conspirators or even presence with conspirators when they may be contemplating committing a crime does not made one a member of that conspiracy. Even knowledge without participation does not make one a member.

As I have said, what the Government must show in this connection is that a Defendant, the Defendant you are considering, became associated, however informally, with this unlawful plan or scheme, knowing its nature, knowing its purpose, and intending to participate, to act in some way to bring about its success.

Throughout the discussion of the question of membership in a conspiracy, I have stressed, as one must, the question of knowledge, of awareness, of understanding. I mention to you to emphasize somewhat further that essential matter that the laws underlying this case and the indictment relate to conduct engaged in knowingly

and willfully.

What I have said to you in effect already is that you could not become a member of a conspiracy of this kind unless you went into it knowingly and willfully.

Perhaps engough has been said already on that subject, but it is central in this first count and it is relevant, as I will mention again in the later three counts, so let me dwell on it just a little bit more by a few general words about this notion of conduct in the legal terms committed knowingly and willfully.

Those words are critical. They describe the essential element in most criminal cases of so called criminal intent. To define them a little bit generally, let me say that although they are vital, they are not technical and they are not complicated in their definition.

We say in this connection that a person acted knowingly and willfully if he acted consciously, purposely, deliberately, with an understanding of what he was doing, and not by mistake or inadvertence or in ignorance of what he was doing.

A defendant, to act knowingly and willfully, need not be shown to have known the specific laws or

statutes that he is charged with having violated. At the same time, he must be shown to have acted with a bad or evil purpose in the sense that he knew his conduct was wrongful, criminal, and that he engaged in it nevertheless, in spite of that awareness.

Knowledge, willfulness, intent are matter that exist in the minds of people. Somebody said in a legal decision some hundreds of years ago, which makes it august and authoritative, that the state of somebody's mind is a fact like the state of somebody's digestion. But in both instances, the facts are of such a nature that we ordinarily can't get at them by direct evidence.

We can't ordinarily inspect by our senses somebody's mind and know what he intends and what he knows and what he believes. So commonly, outside the Courthouse and inside the Courthouse, we rely on so called circumstantial evidence to draw inferences about matters of that kind. We look at the setting of the behavior, the nature of of the behavior, and all the circumstances surrounding the person and how he is behaving.

We enter into this picture our understanding of what kind of person he is and whether he is sufficiently intelligent to know what he is doing and to understand its significance. In short, we put all the circumstances

together, we take all the circumstantial evidence, and from it we decide the state of mind of the person and specifically in a criminal proceeding like this one whether the person we are considering was in the definitions I have given you behaving knowingly and willfully.

It will be your task to do that in this case, to make your judgement on that matter of membership and whether either Defendant became a member of this conspiracy knowingly and willfully.

If you find this conspiracy alleged in the indictment existed, if you find one or both Defendants was a member, it remains for you to consider the third essential element, the requirement of proof of at least one of the three overt acts alleged in the indictment.

Let me say just a little bit about the reason for that requirement. It has been thought by those who have made our law in this aspect that people might get together and talk about doing some criminal thing, might apparently agree to do some criminal thing, but then might abandon the project before taking any single step to carry it out. For a lot of reasons, it has been concluded in most areas of our law, including the area that concerns you here, that mere talk of that

kind, even if it looked like an agreement, should not be made the subject of criminal prosecution.

So, to make out the crime of conspiracy, it is required in general, and here, that at least one overt act be proved, one action, whether it is criminal or it is not, accomplished or taken or done toward the execution of the criminal objective.

Therefore, in an indictment charging a conspiracy and in this indictment you will find allegations of overt acts, and that, as I have told you, is the essential element of this offense. Here three overt acts are alleged, and let me read them to you.

One:

On or about the 30th day of October, 1972, the Defendants, John E. Coughlin, also known as Tinker, and Peter A. Pepe, and Walter Burton, named herein as a co-conspirator and not as a Defendant, entered the Empire National Bank, Hyde Park branch, Hyde Park, New York.

I stop there to mention that obviously entering a bank in itself is not criminal behavior. But if you find that there was a conspiracy and that these people were members of it, and they entered the

bank in furtherance of that conspiracy, you could find that the overt act has been proved establishing this third essential element.

The second alleged overt act says this:

On or about the 30th day of October, 1972, the same three people left the vicinity of the Empire National Bank in a greencolored automobile.

The third alleged overt act is that the same people on the same day left Hyde Park, New York and proceeded to the Stratford Motor Inn, Stratford, Connecticut.

To conclude on this third element, I instruct you, because I must, that you could not convict unless you find at least one of those three overt acts proved beyond a reasonable doubt.

The Government is not required to prove all three of them, but it must prove at least one before the charge of conspiracy may be deemed to have been established.

Now let me turn to counts 2, 3 and 4, the three counts that I have referred to perhaps once or twice as the substantive charges in this case.

Count 2, charged that the two Defendants on that date in October violated a Federal law that I

have referred to once or twice in that they willfully and knowingly and by force and violence and by intimidation did take from the person and presence of another money, to wit, approximately $31,000, belonging to and in the care, custody, control, management and possession of the Empire National Bank, a bank of which the deposits were insured in the way I have mentioned.

In the circumstances of this particular case, with the Federal Insurance not genuinely in dispute, with no serious dispute on the proposition that after that alleged event on October 30th, there was some $31,000 missing from the Empire National Bank, the essential elements that the Government must prove before you may convict on Count 2 or again 3, and again I will enumerate them for you, but this time the explanation about them will be very brief because I think they are fairly clear and simple in their mere statement.

Let me say that each and every one of these three elements must again be proved before you could convict on Count 2 of this indictment. The elements are as follows:

First, that on October 30th, 1972 the Defendants, or the particular Defendant you are considering at any given point, took money from the person or presence

of employees of the Empire National Bank, money which was at that time possessed by or in the custody of that bank; second, that the Defendants or either of them accomplished this taking by force or violence or intimidation; third, that in doing these things, the Defendants acted knowingly and willfully.

As I say, I don't think any of those elements require extensive elaboration. The concept of force or violence or intimidation in the circumstances of this case is not particularly abstruse. I simply instruct you here that to make out this first element, the Government is not required to prove that force or violence was actually used against any person involved in these events.

The first count could be established if you find beyond a reasonable doubt that the taking of that money was accomplished by the use of intimidation that is of placing some other person in fear of physical injury or perhaps even of death. Intimidation may be found to exist if you find circumstances of a kind normally calculated to intimidate people of ordinary understanding and not either extraordinary courage or extraordinary timidity.

Let me be more simple about this matter. In

this case, the jury is permitted to find, to put it very simply, that intimidation may have been accomplished by the brandishing of a hand gun or a pistol and threats to use it, and those in whose presence it was brandished did as they were told by the person wielding that hand gun in that particular case.

I mentioned as the third essential element in this Count 2, that again the Defendants must be shown to have acted knowingly and willfully. Here I won't burden you with more repetition. I simply remind you of the definitions I have you of those terms and the things I said to you about this concept of criminal intent in discussing the conspiracy count, and I instruct you that you must apply those conceptions again in considering all of the counts, and specifically the three substantive counts numbered 2, 3 and 4 in this indictment.

Count 3 of the indictment charges, still dealing with that same episode in that same bank, that the Defendants with intent to steal and purloin did take away some $31,000 from that bank on that occasion. Your instructions at this point are fairly simple.

Let me simply tell you that in the nature of the way these accusations are divided for purposes of

indictment, and in the circumstances of this particular case, it is agreed that if you were to convict on Count 2, it would follow as an inseparably connected matter that you would also convict on Count 3.

On the other hand, it is also agreed that if you were to acquit on Count 2, it would follow that you would acquit on Count 3 and on Count 4 as well.

I don't know how much spelling out that needs. If you acquit on Count 2, you need not go any further. That would require you to acquit on the remaining substantive counts, both 3 and 4.

If you convict on Count 2, you would convict by the same token on Court 3, and then you would consider Count 4, which in the event of a conviction does not follow automatically from 2 and 3.

Let me in that setting turn to Count 4, and instruct you about the separate and additional wrongful conduct that must be found before there could be a conviction on this final count.

The last count, as I have said a couple of times, the fourth count, charges that in the course of committing the bank robbery the Defendants willfully and knowingly did assault or put in jeopardy the lives of people in that bank by the use of dangerous weapons

and devices, to wit, pistols.

This means that if you have convicted on Counts 2 and 3, before you could in addition convict on Court 4, you must be convinced that the Defendants in committing the crimes in Counts 2 and 3 either assaulted one or more persons in the bank or by the use of firearms put in jeopardy the lives of one or more persons. You will note I said either an assault or a putting in jeopardy.

Only one must be shown, though it may be questioned whether too much refined discussion of this distinction is very important in this particular case. But to instruct you more or less fully, as you must be, let me say that the word assault generally, and here, refers to an unlawful attempt or threat to employ force or violence to inflict bodily injury.

To constitute an assault, an attempt or a threat must be coupled with an apparent purpose and ability to carry it out so that in fact fear may be supposed to have been aroused in the intended or threatened victim, fear that he will be or may be subjected to physical injury.

Since the nub of this conception is the threat or the attempt, an actual striking or touching

doesn't have to be accomplished in order to make out an assault in law. To be more or less specific, the flourishing of a gun and the demand that the person who is the target of the flourishing do or not do something on pain of having the gun used against him or her may be found to constitute assault.

Alternatively, if it is realistically an alternative in this case, though there is not an assault, putting people's lives in jeopardy may make out this essential element of the fourth and last count of this indictment. In this case, to find such a putting in jeopardy, you must be convinced beyond a reasonable doubt that in the course of this robbery of the Empire National Bank the accused carried one or more firearms which were drawn and loaded.

It is not necessary that there be direct evidence if you find firearms drawn and brandished, it is not necessary that there be direct evidence that they were loaded. If one is committing a robbery and in the course of it he displays or points a gun to enforce his demands for money or other things and intends in that way to produce fear and compliance in the victims of the robbery, a jury is permitted to infer from those facts that the gun in question was loaded

and was capable of inflicting the kind of deadly injury that was being threatened at the time.

The things I have said conclude the rules of law that you must apply in seeking the facts and in undertaking to reach a verdict on the particular accusations in this particular case. What I must do now is add some other general observations that you should have in mind in the course of your deliberations and then pretty soon we will ask you to retire and proceed to your serious effort to follow these instructions and reach a verdict.

One standard topic in instructions to juries, whether or not it is absolutely essential, is the subject of credibility. I want to say a few things on that general subject, a few general things and a few specific things.

You know, of course, that you have heard from the witness stand flatly conflicting stories about the events at or around October 30th, 1972 that are in dispute in this case. That is a common situation in lawsuits and it is a common and fundamental problem of juries to resolve disputes of that kind, since you depend -- we depend -- on the reports of witnesses for a basic understanding of what did or did not happen

at the times when events may have occured that gave rise to the legal proceedings.

So the subject that we call in shorthand credibility is a regular feature of jury experience, a central and difficult and significant kind of concern for jury deliberations. Though it is vital in that way, it is not a particularly technical subject and not one on which legal people have special wisdom or expertise.

At least in our legal system, we operate on the principle that problems of credibility are likely to be best resolved by bringing people who are not professionals in the law to the Courtroom to apply to such problems the product of their own experience of the world, their own knowledge of human nature, their own experience of what is plausible and implausible, their own acquired abilities to size up and appraise and judge people and the extent to which those people may be relied upon to give credible accounts of the things that are said to have happened or not to have happened in the past.

That is your job here. You will be wanting to review the witnesses who have been before you and to size them up, as the expression goes. You want to ask yourselves as to each witness, did the witness

appear to you to be truthful, candid, frank, forthright, or did the witness appear somehow shifty or suspect or uncomfortable or unpersuasive.

Did the witness appear to know what he or she was talking about and, perhaps most importantly, did it appear to you that the witness intended to tell you accurately what he or she knew?

Was the witness consistent or self-contradictory?

How does the testimony of the particular witness square with other evidence in the case that you may find credible, whether it is evidence from other witnesses, from the same witness or from the physical facts and events as you somehow find them to have existed at the time and at the place in question?

Frequently in our everyday affairs and in the Courthouse, in trying to figure out how much credence we should place on the things someone tells us, we consider the interest or motive that person may have in telling you whatever it may be.

So, in a jury trial the jurors are likely to want to consider interest or a motive in determining questions of credibility. You will be doing that here. You will know, whether a Judge mentions it in instructions or not, that a person's relationship to a party may

create an interest that may affect the truthfulness or untruthfulness of that person's testimony.

A spouse, a friend, a relative may be affected by the relationship in giving evidence. A law enforcement official may have an interest, probably does have an interest, in the outcome of matters with which he is connected, and you will wnat to consider that interest as you review the testimony in this case.

In general, obviously, the fact that somebody has an interest does not mean that we must not believe him. If that were so, we would solve this problem very simply by not getting interested people to testify, and, then, of course, we would ordinarily be unable to learn about the facts in dispute in any case.

So interest does not disqualify anybody, and I don't mention it in that sense. I mention it only as a factor that you will probably take into account whether I mention it or not, among the many factors that you will reckon with in appraising the subject of credibility.

There is one kind of interest that under our law requires special and particular notice, and I come to that now. That is the interest involved in the giving of so called accomplict testimony.

Testimony by someone who says that he was a participant in the

alleged crimes involved in the case and as such participant or accomplice comes before theCourt and the jury to tell what he claims occurred.

That brings you, of course, to the matter that was the subject of much understandable argument on Friday, the subject of the testimony given to you by Walter Burton. In this connection, I am sure you realize from your own common experience that the Government, the prosecution, frequently deems itself compelled, obliged, to rely upon the testimony of accomplices, of persons who themselves engaged in criminal conduct, in order to apprehend and bring about the conviction of others so engaged.

It is the position of the Government, and there really is no quarrel about the propriety or permissibility of this position, that it must take the witnesses as it finds them in undertaking to enforce the criminal law. So there is not any prohibition in the use of accomplice testimony in criminal cases.

On the contrary, in the Federal Courts, at least, it is law that the testimony of an accomplice alone may be sufficient to warrant a conviction if that testimony serves in the particular case to convince the jury of guilt beyond a reasonable doubt.

At the same time, you are instructed that you must scrutinize such accomplice testimony with particular care and treat it with particular caution in determining whether you sould deem it credible. You will want to consider the evidence and the arguments you have heard as to what the motives of Mr. Burton may have been in giving you the testimony you heard from him on the witness stand.

Was his testimony a fabrication in whole or in part, influenced by benefits that he has already received or that he hoped to receive?

Was he lying because of some promises of some favorable consideration relating to his own considerable difficulties with the law?

Or did he, as a matter of his own self-interest or as a matter of conscience or for whatever reason take the stand and tell you the truth in whole or in part?

Did he believe the best way to help himself to get favorable treatment was by making false accusations to the F.B.I. or other law enforcement people and then repeating those false accusations under oath in the Courtroom or did he believe that his own best interests would be served in the end by telling truthfully to

law enforcement people and to you the things he said he knew at first hand?

Those very briefly are the kinds of questions that you will ask yourselves, and I suspect that you would have asked yourselves whether I mentioned them or not, in considering the evidence given by Mr. Burton in this case.

In the end let me remind you that each witness after he or she has been analyzed and dissected must in some way or other be put back together, and all must be judged in the whole setting of the case, in the whole setting of the things you believe from your experience are plausible or implausible, in the whole setting of all the circumstances, in short, in deciding to what extent if at all you will credit the testimony of any particular witness.

The extent to which you credit a witness is a part of the complexion of things that are in your sovereign judgement, to use a phrase that becomes hackneyed in jury instructions.

If you find, for example, that any witness has lied to you about any material matter, it is for you to decide whether you will reject all of the testimony of that witness of you may decide that

parts of it should be accepted because they seem correct, believable and useful in reconstructing the events in question.

Thsse principles, as I said, apply to all the witnesses as you review them and consider what things you reliably learn from any of them about the matters here in controversy.

In deciding matters of credibility and in deciding all the disputed things placed before you, there will be, as you know when you retire, twelve of you. That means that each of you will feel not only entitled but obliged to contribute to those deliberations the benefit of your own judgement, your own appraisal, your own wisdom.

It means by the same token that all of you will go to the jury room ready to listen with patience, attention and courtesy to the views and opinions of your fellow jurors.

If you find during the deliberations that some position that seemed correct to you at some early point seems now to be rationally incorrect, you won't hesitate to change it in your attempt to approach together to the truth and the right of this case.

At the same time, if you have a rational

position that in conscience you believe to be correct, you are not required to sacrifice it or give it up merely because you happen to be out voted or out numbered at any particular point.

As you go ahead and deliberate on the many things I have talked about here, let me mention one thing that ought not to trouble your deliberations, you ought not to speculate in the jury room about questions of punishment or possible punishment.

The question, the prime and prior question of guilty or not guilty is for you the jury, and I have no right to intrude on that. In the same way the question of punishment if a Defendant is found guilty is a question to be reached later on considerations that have not been reached in this trial by the trial Judge.

So to do justice, to be fair, you must not speculate about the possibility of punshiment or about the possible punishment in the performance of your task of determining whether either Defendant is guilty of the charges against him.

If you find when you are deliberating that you need to hear some of the testimony again, send us a note about that through your forelady, and we will

undertake to find it and have it read to you. If you need any of the exhibits, again send a note and we will collect those and have them presented to you.

If you need to hear any of these instructions again or your need some elaborated, again send us a note and I will undertake to supply that need. There are, I remind you, two Defendants and four counts.

That means, strictly speaking, eight separate decisions, on each Defendant, on each of the four counts, and you will make your determinations in that way, judging each Defendant and each accusation one by one, separately and individually.

I think you know, but I remind you, that in order to reach a verdict on any count against either Defendant you must be unanimous. The system in our Court, Mrs. Whitelow,is to have verdicts delivered orally through the Foreman or Forelady of the jury and not in writing, so please plan to follow that procedure if and when you arrive at a verdict.

If at any time in your deliberations you have occasion to send us a note and at that time, as is customary and familiar, you are divided in your vote, don't report the vote to us, don't tell us how you are divided. That is a matter for your private consideration

on which we ought not to be informed and on which we are not permitted to intrude.

I have reached substantially the end of these instructions. Before I excuse our alternate jurors and let the jury retire, let me consult with counsel and see if there are other additional things that I should tell you.

Gentlemen, do you want to come up to the bench?

(At the side bar.)

MR. NESLAND: The Government is satisfied

MR. THAU: Your Honor, the Court charged at great length on willfulness and knowingly, and so on, almost presuming that the Defnedants had been present at the bank, and that their intentions were in question or ought to be decided by the jury.

Under these circumstances, I would ask the Court to charge addtionally that in the event that they have a reasonable doubt that either or both of these Defendants was at Hyde Park at 11:30 in the morning or thereabouts on October 30th, 1972, they should acquit, regardless of anything else in the case.

THE COURT: Denied.

MR. BLACKSTONE: I don't have anything.

Certificate of Service

January 29, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Michael A. Young